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No. 287

Supreme Court of the United States.

OCTOBER TERM, 1942.

ALDUS C. HIGGINS
v.
COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

AND

BRIEF IN SUPPORT THEREOF.

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COMMISSIONER OF INTERNAL REVENUE.

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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Aldus C. Higgins prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the First Circuit entered in the above-entitled case on June 2, 1942.

Jurisdiction.

The judgment below was entered June 2, 1942. The jurisdiction of this Court is invoked under Section 240 (a)

of the Judicial Code, as amended by the Act of February 13, 1925.

Question Presented.

Is the shifting from the grantor of a trust to the trustees of a limited special power to appoint trust income and principal a taxable gift?

Statement.

The taxpayer in 1920 created two trusts, which were identical, except that one was for the benefit of his son and the son's issue and the other was for the taxpayer's daughter and her issue. Each trust was to continue until the death of the child for whom created and until all of the children of such child reached the age of twenty-one years or died. Upon termination the principal was to be distributed to the children of such child and the then surviving issue of any deceased child or children by right of representation. The taxpayer reserved power to change trustees and to appoint principal to any beneficiary and "to modify the terms of this instrument * * * as to the powers of the trustees * * * with respect to the distribution of income or principal among the beneficiaries herein named or described prior to the termination of the trust."

On March 10, 1938, the taxpayer resigned as trustee of each trust, relinquished all powers reserved to him by the trust instrument and gave to the trustees powers, similar to those which he had relinquished, to change the proportions in which, prior to termination, the beneficiaries might enjoy benefits from the trusts.

The Commissioner held that the taxpayer's action on March 10, 1938, constituted gifts of the whole corpus of

each trust fund. The Board of Tax Appeals sustained the Commissioner and determined a deficiency in gift tax of $283,362.65. The Circuit Court of Appeals for the First Circuit affirmed the Board's decision, relying, in substance, upon the following grounds:

1. That it was bound by the *Sanford* case [1] to correlate the gift tax with the estate tax, "without regard to what happens under the income tax."

2. Once it was decided that the reservation of a power to alter the disposition of the property prevents the imposition of a gift tax at the time the trust is created, even though the donor has irrevocably conveyed the beneficial interest out of himself, it does not matter how wide or narrow the range of potential donees may be, so long as the donor, within that range, retains full power to control the disposition of the property.

3. That "certainty or uncertainty of benefit from the standpoint of the donees is not the test of the incidence of the gift tax."

4. Article 3 of Treasury Regulations 79 (1936 ed.) cannot be given application "prospectively any more than retroactively."

Reasons Relied on for the Allowance of the Writ.

1. The decision in this case is in conflict with the decision of the Circuit Court of Appeals for the First Circuit in *Commissioner* v. *Prouty,* 115 F. (2d) 331, the decisions of the Circuit Court of Appeals for the Second Circuit in *Helvering* v. *Robinette,* F. (2d) (March 23, 1942), *Helvering* v. *Marshall,* 125 F. (2d) 942, and *Chase National Bank* v. *United States,* 116 F. (2d) 625, the decision of the

[1] *Estate of Sanford* v. *Commissioner,* 308 U.S. 39.

Circuit Court of Appeals for the Seventh Circuit in *Lilly* v. *Smith,* 96 F. (2d) 341, and the decision of the Circuit Court of Appeals for the Fifth Circuit in *Commissioner* v. *McLean,* F. (2d) (April 23, 1942).

The Court below cited all but one of the above cases and noted that in those cases the gift tax was imposed, although the estate tax would also be imposed later with respect to the same property, and that in those situations there was no correlation of the gift tax with the estate tax. Yet the Court held that, where the question arising in gift tax litigation was whether there had been a completed gift *inter vivos,* it was bound by *Estate of Sanford* v. *Commissioner,* 308 U.S. 39, to correlate the gift tax with the estate tax, and that since it had held in *Chickering* v. *Commissioner,* 118 F. (2d) 254, certiorari denied, 314 U.S. 636, that the reservation of a similar power subjected property to estate tax, the retention of such a power rendered the gift incomplete for purposes of gift tax until the surrender of the power. The Court's error arises from the fact that there can be no correlation of the gift tax and the estate tax where the estate tax reaches out by description to impose a tax in situations involving no transfer of property at death, but in which death furnishes an appropriate occasion for imposing a tax. The estate tax in such cases does not require a transfer. The gift tax, on the other hand, always requires "a transfer of property by gift." The *Sanford* case does not support the Court below, since in that case, as in *Burnet* v. *Guggenheim,* 288 U.S. 280, the gift tax was imposed upon an actual transfer of substantial economic benefits.

2. Since the trustees, after March 10, 1938, possessed substantially the same powers that the taxpayer had held prior thereto, the holding of the Court below, that "certainty or uncertainty of benefit from the standpoint of the

donee is not the test of the incidence of the gift tax," conflicts with this Court's statement in the *Sanford* case (308 U.S. at p. 46) that "It can hardly be supposed that Congress intended to impose personal liability upon the donee of a gift of property, so incomplete that he might be deprived of it by the donor the day after he paid the tax."

3. The decision of the Court below is in conflict with the decision of the Court of Claims in *Cockrell* v. *United States*, 39 F. Supp. 148. See Paul, *Federal Estate and Gift Taxation* (1942) 1168. In the *Cockrell* case the Court of Claims held that, where trustees were given such additional powers as the settlor might grant them, the gift was incomplete, whereas the Court below held that, where the trustees had power to distribute income and principal among the beneficiaries in such proportions as they saw fit, there was a completed gift.

4. The decision of the Court below is in conflict with the decision of that Court itself in *Commissioner* v. *Prouty*, 115 F. (2d) 331, in holding that Article 3 of Treasury Regulations 79 (1936 ed.) cannot be given application prospectively, since the Regulation was given prospective application in the *Prouty* case.

5. The decision of the Court below, in giving retroactive application to the 1940 Regulations and in giving no effect to the 1936 Regulations, is in conflict with the decision of this Court in *Helvering* v. *R. J. Reynolds Tobacco Co.*, 306 U.S. 110, since it ignores the fact that the transaction here in question took place when the 1936 Regulations had been in force two years expressly negativing any tax liability, that they stayed in force for two years thereafter, and remained unchanged through five successive Revenue Acts.

6. The questions involved in this case are of continuing interest and are important questions of Federal law which have not been, and should be, settled by this Court. See

Paul, *Federal Estate and Gift Taxation* (1942) Sec. 17.20.

Wherefore it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the First Circuit should be granted.

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